Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-937

In the Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL ROSENGARTEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 pp

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-937

SAMUEL ROSENGARTEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order dismissing the indictment against them on the ground that a conviction under that indictment would violate the Ex Post Facto Clause of the Constitution (Art. I, § 9, Cl. 3).

On August 13, 1987, petitioners were indicted by a federal grand jury sitting in the Southern District of New York.[1] The defendants were charged with conspiring to defraud the United States by "impeding, impairing, defeating and obstructing the lawful governmental functions of the Internal Revenue Service in the ascertainment, evaluation, assessment, and collection of income taxes," in violation of 18 U.S.C. 371. Pet. App. A3. In particular, the indictment alleged that the purpose of the conspiracy was to create false income tax deductions by backdating

[1] Also charged was co-defendant James Nicholas, who pleaded guilty (Pet. App. A3).

documents relating to a real estate tax shelter. The agreement to backdate the documents was designed, according to the indictment, to produce improper deductions under Section 501 of the Tax Reform Act of 1986, 26 U.S.C. (Supp. IV) 469. The agreement was alleged to have taken place prior to the effective date of the 1986 Act. Pet. App. A3.

Prior to trial, the district court dismissed the indictment (Pet. App. A10-A17). In the district court's view, the defendants could not be charged with conspiring to defeat the collection of taxes where the agreement took place prior to the date the pertinent tax statute went into effect. Following what it believed to be the dictates of a prior Second Circuit decision, the district court held that to convict the defendants of a crime for such conduct, without proof of some overt acts occurring after the effective date of the statute, would violate the Ex Post Facto Clause of the Constitution. Pet. App. A17.

The court of appeals reversed and remanded the case for reinstatement of the indictment (Pet. App. A1-A9). The court concluded that "a conspiracy to frustrate or obstruct the IRS's function of ascertaining and collecting income taxes falls clearly within the ban of section 371" (*id.* at A6). Therefore, the court held, the effective date of Section 501 was not determinative of whether petitioners committed the crime of conspiring to defraud the United States. As the court noted, the Ex Post Facto Clause "did not preclude the Government from protecting itself against [petitioners], who would have prevented the IRS from properly administering its affairs by conspiring to violate an already-enacted revenue statute prior to its effective date" (Pet. App. A8).

Petitioners contend (Pet. 5-14) that the decision of the court of appeals is contrary to the decisions of this Court

and other courts of appeals construing the Ex Post Facto Clause, and that the court's decision improperly construed the federal conspiracy statute, 18 U.S.C. 371. Whatever the merits of petitioners' contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss the indictment. If petitioners are acquitted at trial, the issues they now present will become moot. On the other hand, if petitioners are convicted after trial, they will be able to present their Ex Post Facto and statutory claims to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1988

[2] Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

U.S. GOVERNMENT PRINTING OFFICE 1988—241 699/00011